Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-3164

JAMES KARNES - - - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Miscellaneous References:

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United States Constitution, Amendment VI 3, 10, 13

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SUPREME COURT OF THE UNITED STATES

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No. _____

JAMES KARNES - - - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, James Karnes, respectfully prays that a Writ of Certiorari issue to review the Judgment and Order of the United States Court of Appeals for the Sixth Circuit decided June 27, 1977.

OPINION BELOW

The Judgment and Order of the United States Court of Appeals for the Sixth Circuit is as yet unreported, but is styled in that Court as *United States* v. *Karnes* (No. 77-5022).

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was decided and filed on June 27, 1977. A timely Petition for Rehearing was filed and was denied on July 21, 1977. Jurisdiction is invoked under authority of 28 U.S.C. §1254(1).

QUESTION PRESENTED

I. Whether the District Court erred when it forced the petitioner to stand trial, over his counsel's objection, after learning that the petitioner was inebriated or under the influence of drugs.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Additionally, the Sixth Amendment to the same Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The statute which is involved here is 18 U.S.C. §472.

STATEMENT OF THE CASE AND FACTS

The petitioner, James Karnes, was indicted along with George Douglas Neville on charges of passing counterfeit Twenty ($20.00) Dollar Federal Reserve notes. Specifically, Neville was charged with passing two (2) particular bills on the 17th day of July, 1976 and Karnes was accused of passing yet another bill on that same date. Trial commenced on October 5, 1976. Immediately prior to trial, counsel for both Karnes and Neville called the Court's attention to the inebriated appearance of their respective clients. Counsel for petitioner particularly advised the Trial Court that he did not know whether Karnes was under the influence of drugs or inebriated, but did advise that Karnes was barely able to hold up his head or keep his eyes open. At that point counsel for petitioner requested a continuance of the case because of Karnes'

condition. The Trial Court had both defendants brought to chambers for an examination of their condition after which the Court overruled the Motion of counsel for continuance on the basis of the defendants' inability to properly be able to assist in their defenses. Thereafter, Court convened at 9:47 a.m. When called upon to announce the status of their case situation, counsel for the defendants approached the bench to advise the Court that they would have to announce ready for trial, but subject to the previous Motions made because of the defendants' condition.

After selection of the jury, the Court called counsel to the bench and indicated its proposal to recess the proceedings some three (3) hours, until 1:30 p.m., to allow the defendants to become more presentable. After discussion, it was determined that the defendants should be committed to the custody of the Marshal during the course of the recess in order to avoid the attraction of intoxicants.

Upon returning to Court that afternoon, counsel for the defendants met with the Trial Judge in chambers and advised that the defendants were still suffering from the same infirmities exhibited earlier. Counsel for Karnes particularly advised that he did not believe that Karnes was capable of testifying, sitting at counsel table or holding his head up. Moreover, counsel advised that he had to continually jostle Karnes throughout the morning to insure that he was not going to either fall backwards or forwards, that Karnes was snoring and that it was his present belief that Karnes was under the influence of some drug. At that point

counsel for both defendants respectfully requested that the Court declare a mistrial. Whereupon, the Court indicated that it felt that counsel were in a position to overcome the small handicap and once again overruled counsel's Motion.

Wth regard to the evidence against the petitioner, the United States called Mrs. Shirley Singleton, the owner and operator of a bar in Louisville called the King of Clubs, who testified that her business received four (4) counterfeit Twenty ($20.00) Dollar bills during the course of the evening of July 17, 1976. In her testimony she indicated that she saw what appeared to be an exchange of money between the two defendants and was later advised by a waitress that the defendant, Neville, had given the waitress a counterfeit Twenty ($20.00) Dollar bill. Mrs. Singleton stated she subsequently received a second counterfeit Twenty ($20.00) Dollar bill from a third individual in the bar, which she gave to her bartender to place in the cash register. It was subsequently established that the third individual was named Gene Robinson. In further testimony Mrs. Singleton indicated she received a third bill, which she believed was counterfeit, from Karnes, and this bill was also tendered to the bartender for placement in the register. According to further testimony, Mrs. Singleton indicated that Karnes ordered the bill from her bartender and paid for it with another Twenty ($20.00) Dollar bill which also appeared to be counterfeit. She stated that the police were present at the bar by then and arrested Karnes, Neville and Robinson and another individual, and then took the

men to the outside of the establishment. At that time, according to the witness, while the men were standing adjacent to the building, a fifth Twenty ($20.00) Dollar bill floated to the ground between Neville and Karnes

Shirley Singleton then testified about Karnes coming back to the bar on a later occasion and offering to make restitution for Twenty ($20.00) Dollars, stating that he was not aware of the counterfeit nature of the bill passed on July 17, 1976 and further indicated that he must have been set up.

Officer Witten, Louisville Division of Police, was called to testify about placing the men under arrest and subsequently taking them to a Louisville Police Sub-Station at which time the Officer indicated that he talked with Karnes and was informed by Karnes that he did not know how he (Karnes) received the Twenty ($20.00) Dollar bill, and that Karnes stated that Robinson had said to buy some drinks with the money.

Special Agent Stokes from the Secret Service was called by the United States to testify about his participation in the investigation and about the arrest of Karnes and Neville. Stokes advised that he had interviewed Karnes a total of three (3) times. The first interview resulted in Karnes stating that he had tendered a Twenty ($20.00) Dollar bill to the bartender, but denied knowing it was a counterfeit bill. The second interview took place at the Jefferson County Jail where, according to Stokes, Karnes said he received a bill from Robinson but continued to deny knowledge

that the bill was counterfeit. The third interview took place two days after the arrest when Karnes purportedly stated to Stokes that he knew of the counterfeit nature of the bill. Yet, in the same paragraph of testimony, Agent Stokes states that Karnes still maintained he did not know the bill was "bad and counterfeit."

Officer Vowels, also of the Louisville Division of Police, was called to testify about receiving the five (5) questioned Twenty ($20.00) Dollar bills and thereafter transferring them to the Secret Service officers. Vowels further testified that he had received four (4) of the bills from Shirley Singleton and had found one (1) laying on the ground near the defendants after their arrest.

On submission to the jury, the defendant, Neville, was acquitted on the two (2) counts of the Indictment applying to him, but the petitioner, Karnes, was convicted on the remaining count. The Court sentenced Karnes to the custody of the Attorney General for a period of five (5) years.

REASONS FOR GRANTING THE WRIT

The Fifth Amendment of the Constitution of the United States of America states, in part, that no person shall ". . . be deprived of . . . liberty, without due process of law . . .". Also, the Sixth Amendment of that same Constitution provides, in part, that an "accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be con-

fronted with witnesses against him . . . and to have the assistance of counsel for his defense". It is James Karnes contention and belief that these very basic rights were denied him at his trial held October 5 and 6, 1976 in the Western District of Kentucky.

I. Whether the District Court Erred When It Forced the Petitioner to Stand Trial, Over His Counsel's Objection, After Learning That the Petitioner Was Inebriated or Under the Influence of Drugs.

On the morning of October 5, 1976, immediately prior to trial, petitioner's counsel informed the Trial Judge that he believed his client to be either inebriated or under the influence of drugs. Counsel further advised the Court that Karnes was barely able to hold his head up or keep his eyes open and as a consequence requested a continuance of the scheduled trial. The Court had Karnes brought to chambers for an examination of his condition. Counsel had moved for the continuance on the basis of the petitioner's inability to assist and participate with counsel in the defense of the matter. The Trial Court overruled the Motion and had Court convened at 9:47 a.m.

When counsel was called upon to announce the status of the case, he approached the bench to advise the Trial Judge that he would have to announce ready, in light of the Court's previous ruling on the Motion for a continuance. Selection of the jury followed, after which the Court called counsel to the bench and indicated that Court would be recessed from some three (3) hours, until 1:30 p.m., in order to allow the petitioner

to become more presentable. Karnes was committed to the custody of the Marshal during the recess to avoid any opportunity to obtain further intoxicants.

When Court reconvened that afternoon, counsel met in chambers with the Court to advise that Karnes still appeared to be suffering from the same condition. The Court was particularly advised that counsel did not believe that Karnes was capable of testifying, sitting at counsel table or even holding his head up. Moreover, the Court was advised that Karnes had to be continually jostled throughout the morning session of court to keep his head from falling backwards or forwards and that Karnes had snored through some of the proceedings. Counsel expressed his belief that the petitioner was under the influence of some drug, and respectfully moved the Court to declare a mistrial. The Court then expressed a belief that counsel overcome this small handicap and again overruled counsel's Motion.

The petitioner urges that the Trial Court had more than ample notice of the defendant's condition to warrant the sustaining of either of counsel's Motions for a continuance or mistrial. It is submitted that the record in this matter amply points out that the Court knew something was awry because the Court felt compelled to adjourn the proceedings for at least three (3) hours to allow the petitioner to regain some composure. According to counsel, this adjournment was of little benefit because Karnes was still in substantially the same condition as before. It was at this juncture that counsel advised the Court of his opinion that Karnes was under the influence of drugs rather than alcohol and his belief that the Court should grant a mistrial.

It is argued that the rights of an accused under the Fifth and Sixth Amendments of our Constitution are of little benefit to a person in the condition described in these proceedings. If a person is lolling around, falling asleep and otherwise physically unable to maintain an attention span, he can hardly evaluate any testimony that may be directed against him from a witness in a trial. Consequently, the due process, accusational nature, or confrontation clauses of the Fifth and Sixth Amendments have little practical applicability to a person in this condition. The assistance of counsel clause has only slightly higher application if counsel is reasonably familiar with his client's case. Nevertheless, counsel may as well be sitting at the Bar alone as with a client in the condition attributed to Karnes on his day of trial.

It has been held that a conviction of an accused while he is incompetent violates due process. *Bishop* v. *United States,* 350 U. S. 961, 76 S. Ct. 440, 100 L. Ed. 835 (1956) (Facts and Opinions: 96 U. S. App. DC 117, 223 F. 2d 582, C.A. DC 1955). While *Bishop, supra,* involved a question of insanity, the petitioner believes that the application of the concept of competence is analogous. The ". . . test must be whether (the defendant) has sufficient *present* ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him" and "it is not enough for the District Judge to find that 'the defendant (is) oriented to time and place and (has) some recollection of events' ".

Dusky v. *United States,* 362 U. S. 402, 80 S. Ct. 788, 789, 4 L. Ed. 2d 824 (1960). (Emphasis added.) See also *Pate* v. *Robinson,* 383 U. S. 385, 86 S. Ct. 836, 842, 15 L. Ed. 2d 815 (1966) for the proposition that brief colloquies with Trial Judge, showing some alertness and understanding, does not obviate the need for a thorough examination of a defendant's competence when the issue is placed squarely before him. A discussion of both sides of part of this issue may be found in *American Law Reports, 2d Series: Trial—Drugged or Intoxicated Accused,* 83 ALR 2d 1067, *et seq.*

Anticipating the respondent will argue that Karnes voluntarily put himself in this stupored condition and, therefore, should not be entitled to relief for that reason, the petitioner urges that sanctions were available to the Court to impose against Karnes for appearing in this condition including revocation of his bail and citation for contempt. It is not as though the Court was powerless to punish such behavior if it found the condition to have been voluntarily induced. Moreover, in some of those cases which denied relief, the basis for the denial seemed to be that the condition was not called to the Court's attention at the time of trial by either the defendant or his counsel and, therefore, not subject to realistic proof. These cases involved allegations raised through post convictions relief procedures. 83 ALR 2d 1067 *et seq.* In the present case, Karnes' counsel placed the Court on notice of the petitioner's condition on two separate occasions. Moreover, the Court was obviously cognizant of the condition, in some

measure, because of the Court's decision to recess the trial for at least three (3) hours so that the petitioner might be more presentable.

The petitioner, through counsel, wishes to advise this Court that he recognizes that sanctions should be imposed against an individual who allows himself to become either drunk or "high" on drugs and then appears in Court in that condition. The imposition of such sanctions are available to the Court, but the forcing to trial on serious criminal charges should not be one of those sanctions. While such conduct may be reprehensible and an affront to the dignity of the Court, solace should not be obtained by placing a defendant in a trial environment where he is unable to appreciate the gravity of the circumstances and is totally lacking in the ability to assist those people who are trying to insure that his basic rights are protected under the law. Revocation of bail might be in order, as well as a citation for contempt of Court, but not a trial based upon accusations and testimony of witnesses that potentially affects his liberty for a long time in the future. A drunk or a person "high" on drugs at the time of trial is hardly in a position to face his accusers, be aware of their accusations, assist counsel or otherwise participate in his defense. A Trial Court would hardly allow a trial to proceed if an attorney so appeared. It should be no different when its the accused in such a condition.

James Karnes may very well have caused himself to be in the stuporous condition that he appeared at trial

on October 5, 1976. But, it was, nevertheless, his attorney's duty and the Trial Judge's obligation to protect the trial rights of Karnes as guaranteed by the United States Constitution. Karnes' counsel did all that he could to protect those rights, but the Trial Court failed to recognize the gravity of the situation. For the Court to observe that counsel could overcome that small handicap does not pass muster, when there is a defendant falling asleep continuously. Karnes was hardly in a position to confirm or deny the allegations of the Government witnesses when he was in that type of physical and mental state during the course of their testimony.

CONCLUSION

The Constitution of the United States, through its Fifth and Sixth Amendments, provide persons with fundamental protections from unreasonable trial situations. These Amendments, in providing for a right to a fair trial, set forth standards and safe-guards to protect an accused from being overreached during the course of a trial. When these standards or safeguards are breeched, during the course of a trial, it is the duty of the appellate courts to remedy the violations of constitutional precepts which occurred.

It is not difficult to appreciate that a Trial Judge, or an appellant court, would have little sympathy for a defendant who appeared in Court on the day of trial in either an inebriated or drugged situation. In this matter, the petitioner, through his counsel, concedes

the fact that this condition was obviously induced voluntarily. However, even that concession does not vitiate the fundamental concepts contained in our Constitution as that document applies to deprivation of liberty and the confrontation of witnesses. As the transcript of the trial readily reflects, all of the Government's witnesses appeared against Karnes during the course of that first afternoon. It is difficult to understand how Karnes could appreciate the gravity of the circumstances that the witnesses testified about while he was in the condition that was described twice to the District Court. All phases of any trial are critical, but some are more critical than others. Certainly, the stage at which the prosecution presents its evidence is the latter. Neither the confrontation nor the due process clauses of our Constitution have much meaning in a trial where a defendant is sleeping or lolling around during the evidentiary proceedings.

The petitioner submits that the record in this matter, on this point, is as well documented as any that have previously received appellate review. The facts were placed before the District Judge by trial counsel and were also observed by the District Judge on his own. Yet, the trial commenced with only a three (3) hour interlude, which found Karnes in no better condition than he was at the time the recess was ordered by the Court acting on its own.

Wherefore, the petitioner submits that the question presented by this Petition is of such importance to the proper administration of justice that this Court should

accept jurisdiction and issue a Writ of Certiorari to review the Opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

JOSEPH G. GLASS
118 South Fifth Street
Louisville, Kentucky 40202
Counsel for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 77-5022

UNITED STATES OF AMERICA - - *Plaintiff-Appellee*

v.

JAMES KARNES - - - - *Defendant-Appellant*

ORDER—Filed June 27, 1977

Before: WEICK and PECK, Circuit Judges, and FREEMAN*, Senior District Judge.

Defendant-appellant perfected this appeal from his conviction pursuant to jury trial for having uttered a counterfeit $20.00 Federal Reserve Note in violation of 18 U.S.C. § 472, and the appeal has been submitted on the record and on the briefs and arguments of counsel. Being fully advised in the premises, the Court concludes that the district judge did not abuse his discretion in denying a continuance in proceeding to trial in the circumstances reflected in the record, that the essential elements of the offense were established by substantial evidence offered by the plaintiff-appellee, and that because the serial number of the note in question constituted surplusage in the indictment, there was no failure of proof in this regard. Accordingly,

IT IS ORDERED that the judgment of the district court be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT
(s) John P. Hehman
Clerk of Court

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*Honorable Ralph M. Freeman, United States District Court for the Eastern District of Michigan, sitting by designation.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 77-5022

UNITED STATES OF AMERICA - - *Plaintiff-Appellee*

v.

JAMES KARNES - - - - *Defendant-Appellant*

ORDER—Filed July 21, 1977

Before: WEICK and PECK, Circuit Judges, and FREEMAN, Senior District Judge.

Upon consideration of the petition for rehearing filed herein by appellant, the Court concludes that the issues raised therein were fully considered upon the original submission and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is denied.

Noting that our order of June 27, 1977, contains an error of transcription, the clerk is directed to strike the word "in" the second time it appears in line 7, and to substitute the word "and" therefor.

ENTERED BY ORDER OF THE COURT
(s) John P. Hehman
Clerk of Court

Supreme Court, U. S.
FILED
NOV 4 1977
MICHAEL RODAK, JR., CLERK

No. 77-316

In the Supreme Court of the United States

OCTOBER TERM, 1977

JAMES KARNES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-316

JAMES KARNES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the trial judge abused his discretion by denying a motion for a mistrial based on the allegation of defense counsel that petitioner appeared intoxicated or under the influence of drugs on the morning of trial.

1. Following a jury trial in the United States District Court for the Western District of Kentucky, petitioner was convicted of one count of uttering a counterfeit $20 bill, in violation of 18 U.S.C. 472. A co-defendant was acquitted (Tr. 317). Petitioner was sentenced to five years' imprisonment. The court of appeals affirmed *per curiam* (Pet. App. A).

When petitioner's case was called for trial, defense counsel moved for a continuance, stating that petitioner

"appear[ed] to be totally inebriated" or "under the influence of drugs" and kept falling asleep (Tr. 5). The court called petitioner and his co-defendant into chambers, where the following conversation between petitioner and the court took place (Tr. 10-12):

BY THE COURT: (To. Mr. Karnes) How do you feel this morning?

MR. KARNES: All right.

BY THE COURT: Pardon me?

MR. KARNES: Fine.

BY THE COURT: Feel good?

MR. KARNES: Sure. Ready to go to court.

BY THE COURT: Pardon me?

MR. KARNES: Ready to go to court.

BY THE COURT: Ready to go to court?

MR. KARNES: (Nods head affirmatively.)

BY THE COURT: Well, your lawyer said—made some mention to the fact that you might not be ready, that you might have had a drink or two.

MR. KARNES: Well, I did have a few drinks last night.

BY THE COURT: Last night?

MR. KARNES: Yes, sir.

BY THE COURT: Nothing this morning?

MR. KARNES: No.

BY THE COURT: So you're just recovering from maybe too many drinks last evening?

MR. KARNES: Yes, sir.

BY THE COURT: Do you feel okay this morning, ready to go to trial?

MR. KARNES: Well, I don't know if I can answer the questions right.

BY THE COURT: Well, you haven't had any problem telling your lawyer about your side of this controversy, have you?

MR. KARNES: Not up to this point. But maybe I will have now. I'm sort of jittery and shaky.

BY THE COURT: Well, if you can—I mean, you don't have any problem making him understand you and you think you can assist him in the trial of your case, do you?

MR. KARNES: Please?

BY THE COURT: You don't have any problem communicating with your attorney and discussing your case with your attorney and assisting him and helping him in your defense, do you?

MR. KARNES: Why, I don't know. I don't know if I would say the right thing or the wrong thing.

BY THE COURT: Well, I don't know about that, either. But I'm just talking about, you can say what you intend to say, can't you?

MR. KARNES: I—well, yeah. But I don't know if that would be right or wrong.

BY THE COURT: Well, you can tell the truth, can't you,—

MR. KARNES: (Interrupting) Yeah.

BY THE COURT: (Continuing)—if you are to be testifying? I don't know; he may not call you. That's a decision for you all to make.

All right. You can go. Overrule the motion.

At 10:40 a.m., after a jury had been selected, the court ordered a recess until 1:30 p.m. to permit the defendants to rest and make themselves more presentable (Tr. 43, 46). Following the recess, petitioner's counsel said that his client's condition had "improved" but stated that petitioner was still not capable of testifying and that petitioner had fallen asleep several times during jury selection that morning (Tr. 47-49). Counsel then moved for a mistrial (Tr. 49-50). After noting that neither defendant would testify that day (Tr. 47-48), the court denied the motion (Tr. 53), stating that there was no reason to believe that either defendant was incapable of assisting his attorney in the conduct of the defense (Tr. 52).

2. The issue presented by this petition is the paradigm of the kind of issue that must necessarily be committed principally to the discretion of the trial court. Here, there is no basis for concluding that the trial court abused its broad discretion in refusing to grant petitioner's motions for a continuance and a mistrial. Petitioner never claimed that he was, in fact, intoxicated or under the influence of drugs, and nothing in the record or in the petition indicates that petitioner fell asleep or was otherwise incapacitated during the testimony that afternoon.[1]

[1]The testimony consisted of the following: The owner of a local tavern testified that petitioner uttered two counterfeit $20 bills (Tr. 82, 83). She said that petitioner later returned to the tavern after his arrest and offered to make restitution for one of the counterfeit notes (Tr. 85-86). A Secret Service Agent testified that petitioner made three different statements concerning the incident (Tr. 129, 131) and that, in the third statement, petitioner first admitted and then denied knowing that the bills were counterfeit, claiming that others had given him the money, told him to try to pass it, and promised to take care of him if he got into trouble (Tr. 131). When petitioner testified on the second day of trial, he denied having ever told the agent that he knew the bills were counterfeit or that others had asked him to pass the bills (Tr. 197, 207).

Moreover, the transcript demonstrates that petitioner responded coherently to the trial judge's questions in chambers and stated only that he had a hangover (see pp. 2-3, *supra*). On the basis of this record, the trial judge concluded that petitioner could assist in his own defense, and the court of appeals correctly refused to substitute its judgment for his on-the-spot observations and impressions. See *Bernstein* v. *Travia*, 495 F. 2d 1180 (C.A. 2); *United States* v. *Goodwin*, 455 F. 2d 710 (C.A. 10), certiorari denied, 409 U.S. 859; *Stein* v. *United States*, 263 F. 2d 579 (C.A. 9); *United States* v. *Tom*, 340 F. 2d 127 (C.A. 2), certiorari denied, 382 U.S. 912; cf. *Illinois* v. *Allen*, 397 U.S. 337.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

NOVEMBER 1977.

DOJ-1977-11